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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

■

WALTER CHAPLINSKY, *Appellant*

v.

STATE OF NEW HAMPSHIRE

■

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLANT'S REPLY BRIEF

JOSEPH F. RUTHERFORD
HAYDEN C. COVINGTON
Attorneys for Appellant

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As to the construction of the statute, and what acts it does or does not cover, this Court is not concerned and the state court interpretation is usually final. However, this rule does not enjoin this court from determining whether the statute as so construed by the state court violates the Federal Constitution. If so found, it is the duty of this court to reverse the court below. *Henderson* v. *New York*, 92 U.S. 219, 237.

The statute has been construed so as to prohibit the speaking of the truth concerning any matter of public concern when it is offensive to others. The court below says: "The truth would be no justification." (R. 55) The statute prohibits use of words that might start a fight and derisive words which might excite "the addressee to a breach of the peace". (R. 62) It is thus given a broad

and sweeping application so as to cover lawful but offensive words which *are not* profane, immoral, indecent or epithets. The broad generality of the words "offensive", "derisive" and "annoying" is recognized by the court below in these words: *"Though general in a sense,* such words [of the statute] have commonly accepted popular and legal significance."

We have searched the reports and find only one case where a statute similar to this one has been passed upon in light of the Constitution. In that case a statute almost identical with this one was held to be unconstitutional and violative of the United States Constitution. That is the case of *State of New Jersey* v. *August Klapprott et al.*, 22 A. 2d 877, decided December 5, 1941, by the Supreme Court of New Jersey. The statute knocked down in that case reads as follows:

> "Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdemeanor."

Klapprott and others were accused of having made anti-Jewish speeches in violation of the statute. Their demurrers to the indictment were overruled and each was sentenced to twelve months in prison and fined. It was held that the statute denied freedom of speech and that the terms of the statute were vague and indefinite, constituting a dragnet, all in violation of the "due process" clause of the United States Constitution.

We submit this decision as persuasive argument in favor of our contentions here. It is directly in point and the entire opinion should be considered by this Court.

The decisions cited and relied upon by appellee are not in point because they are based upon the rules (1) that freedom of speech does not give the right to *"falsely* shout 'fire' in a crowded theatre", and (2) does not authorize use of profane, immoral, indecent words or epithets. Admittedly the exceptions relied upon by appellee to escape the Constitution do not apply here because (1) the words, TRUE, not FALSE, were provoked by addressee's *wrongful* conduct toward appellant and (2) the words were not profane, were not immoral, were not indecent and were not epithets *but were, in the extraordinary circumstances, fair and honest expression of appellant's opinion of the public officers of Rochester, New Hampshire.*

Appellee attempts to make it appear that appellant was purveying 'racial and religious hatred' and invited violence. The record does not support appellee in this contention. On the contrary, the undisputed evidence shows that Chaplinsky was conducting himself in a lawful manner while exercising his constitutional rights. While he was thus engaged, the officers *viewed* the unlawful and criminal assaults committed against Chaplinsky. He was not *first* taken into custody for any unlawful conduct. Those officers failed and refused to arrest Chaplinsky's assailants. Appellee and the court below state that appellant was arrested 'for his own protection'. This admitted and judicially sanctioned action by public officers in restraining Chaplinsky constituted, therefore, a "false" arrest.

Conceding for purpose of argument only that such "false" or "fake" arrest was morally justifiable in the circumstances (by reason of the fact that the officers themselves were physically powerless to shield Chaplinsky against the vastly superior number of mobsters), it is undeniable that the officers' conduct became a violation of their oath of office and the constitutions when they deliberately *transformed* that claimed "false" or "fake"

arrest (for "protection") into a bona fide restraint for purposes of prosecution.

The conduct of Marshal Bowering in taking Chaplinsky into *'protective custody'* is NOW justifiably likened unto the conduct of A. Hitler and B. Mussolini who in recent months have similarly taken defenseless nations and peoples of the minority into *"protective custody"*.

The doctrine of individual liberty, as conceived in this country, is not a privilege reserved for the few. It belongs to all who are living under the government. We submit that the people of the United States should not and will not consent to the abandonment of the very principles upon which this country was founded, while fighting an all-out war to preserve them. Freedom to do right, freedom to speak the truth for a right purpose, is an *American* privilege. In this connection it is well to reflect upon the profound expression of this Court in *Ex parte Milligan*, 4 Wall. 2, 120, and the dissenting words of Mr. Justice Sutherland in *Associated Press* v. *N. L. R. B.*, 301 U.S. 103, 133.

Although it would have been lawful for Chaplinsky to immediately and forcibly resist such unlawful restraint, he, as a minister of Almighty God, chose to physically submit and tolerate the officers' violent manhandling of him, and contented himself with trying to arouse them with bold speech to see the trend of their wrongful conduct toward him. When he discerned that the officers were *seriously* and not "falsely" (i.e., feignedly) arresting him he became righteously indignant. Expression of righteous indignation against wrongdoing is proper and due, because he who follows the Lord Jesus Christ cannot silently look with approval upon wrongdoing. The Scriptural rule is: "Be ye angry, and sin not."—Ephesians 4:26.

Even the court below recognized the unlawful action by the officers in stating that Chaplinsky's resentment might well have extended to the police. (R. 54, 56) In this connection it is interesting to note that other courts

have held, *the fact that speech is likely to produce violence is no ground for suppressing it;*[1] and *it is the duty of the police to protect the one exercising his constitutional right of free speech against those who attack him by arresting the culprits.*[2]

In *Thornhill* v. *Alabama*, 310 U.S. 88, this Court said:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government . . . . Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion."

The supposed danger which appellee aims to portray, to wit, threatened breach of the peace, is not of sufficient magnitude to warrant the restraint here attempted to be imposed upon the *exercise* of the right "so vital to the maintenance of democratic institutions". (See Freund, "The Police Power," page 133, section 143.) Here the "evil" is not substantive, is not imminent nor of extremely serious degree, is not extremely high, and therefore the utterance is not punishable, especially in view of the unlawful provoking conduct of State's witnesses on the occasion in question.

Here we submit as our argument the entire opinion in the case of *Bridges* v. *State of California* and *Times-Mirror Co. et al.* v. *The Superior Court of California*, Nos. 1 and 3, October Term 1941, decided December 8, 1941, by this Court, 62 S. Ct. 190, which is directly in point.

Here the facts do not show any breach of peace, actual or threatened, caused by appellant. If there were any such, the "proximate cause" thereof is shown to be the action

[1] *Whitney* v. *California*, 274 U.S. 357, 372.

[2] *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479; *American League of Friends of New Germany*, etc. v. *Eastmead*, 116 N.J. Eq. 487.

of the hoodlum friends and coconspirators of the police officials and the chief of police himself. The officials did not do their duty, but violated the law.

Appellee argues that the words employed by Chaplinsky constituted a clear and present danger *especially when stated in the presence of and to the police and public officials.* This statement is frivolous and beside the point. If the officials are lawful and conduct themselves in a proper manner they would not breach the peace because of such utterance. The appellee's argument insults the law-abiding officials and imputes to them that they will not do their duty and keep the peace. We submit that law-abiding officials are the last ones expected to commit a breach of the peace when words of criticism are addressed against them. If such officials are not law-abiding, then we submit that such misconduct of the officials should not be made the basis of conviction of innocent citizens exercising their lawful rights.

It is to be noticed that the statute in question is not narrowly drawn and does not prohibit any specific conduct. It is not confined to that type of speech subject to the police power, but extends to all types of speech. The statute is not a libel statute and does not purport to be a statute punishing breach of peace or threatened breach of the peace. The State of New Hampshire has statutes on such matters in addition to the statute here drawn in question. The "catch all" statute here involved is manifestly construed in an unconstitutional manner, and is void on its face.

On this subject we quote from *Herndon* v. *Lowry,* 301 U. S. 242:

> "The power of a state to abridge freedom of speech and of assembly *is the exception rather than the rule* and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized

government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. . . .

"After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question: 'A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.' [*Stromberg* v. *California*, 283 U.S. 359, 369]"

The *clear and present danger* rule to be applied by the court is a rule of reason.

It can can be correctly applied only by exercise of good judgment.

And to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty.

To reach sound conclusions on the matter of "clear and present danger" the court should bear in mind why a State is, ordinarily, denied the power to prohibit utterances which a vast majority of its citizens believe to be false and fraught with evil consequences. Those who won the independence of these United States believed that the final end of the State was to enable free men to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political, commercial and Biblical truth; that without free speech and

press and assembly and worship discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.

We say that if the statements made by appellant were untrue, then why were they not proved to be false? Why does not someone answer the charges made? The greatest menace to freedom is an inert people, listless and indolent and steeped in lethargy because of a throttled press, and a people frightened into silence.

Public discussion is a public duty and is of convenience, interest and necessity. This is and has been the fundamental principle of the American government until recently when the totalitarian spirit has swept the world resulting in a "few" in this country attempting to fight totalitarian rule abroad by establishing it at home.

The men who founded this country knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances, errors and practices in politics and religion and proposed remedies. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech, press and worship of Almighty God should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech, press and worship. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that the serious evil will result if free speech is practiced. There must be reasonable ground to believe that

the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

> "But even advocacy of violation (of law), however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The foregoing is from dissenting opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 372.

CONCLUSION

The violent conduct of Marshal Bowering was nothing short of incitement to a violation of the law, and at most the facts show entrapment of the appellant which, to adopt a quotation of Justice Brandeis, 'places the liberty of every man in the hands of every petty officer.' To sustain the contention of the appellee is to permit sabotage of the liberties of the people and subvert freedom of speech contemplated for protection by the Constitution.

For the reasons above stated in support of the contentions in our main brief, we submit that the judgment should be reversed and the appellant discharged.

JOSEPH F. RUTHERFORD
HAYDEN C. COVINGTON
Attorneys for Appellant